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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-909

JESSE BYRD, TRAVIS A. TAPIA AND OFFICERS FOR JUSTICE, *Petitioners,*

vs.

CHARLES R. GAIN, *et al.* *Respondents.*

Petition for a Writ of Certiorari to The United States Court of Appeals For the Ninth Circuit

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1977

NO.

JESSE BYRD, TRAVIS A. TAPIA

AND OFFICERS FOR JUSTICE,

Petitioners,

vs.

CHARLES R. GAIN, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioners Jesse Byrd, Travis A. Tapia, and Officers for Justice respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on August 2, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 558 F.2d 553 (9th Cir. 1977). The opinion is reproduced as Appendix A attached hereto. The memorandum and order of the District Court for the Northern District of California, is not reported and it appears along with the judgment as Appendix B attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 2, 1977. A timely petition for rehearing and suggestion for a rehearing en banc was denied on September 27, 1977, and this petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment permits a police department to impose disciplinary sanctions upon lower-echelon police officers of minority extraction for making public comments, off-duty, criticizing colorably unconstitutional police practices as racially discriminatory?

2. Whether a police personnel rule prohibiting pure speech which reflects discredit upon a police department or any members is unconstitutionally vague and overbroad?

3. Whether disciplinary sanctions against off-duty police officers, based on the content of free expression or the identity of the speaker violate the First Amendment and Equal Protection Clause of the Fourteenth Amendment?

4. Whether summary judgment is a permissible tool for resolving the critical First Amendment issues involved in this case?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

United States Constitution, Amendment I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1, provides, in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 2.13 of the San Francisco, California, Police Department provides:

> Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within

> or without the state which tends to subvert the good order, efficiency or discipline of the department or which reflects discredit upon the department or any member thereof or that is prejudicial to the efficiency and discipline of the department, though such offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficerlike conduct triable and punishable by the Board.

STATEMENT OF THE CASE

This lawsuit, brought pursuant to 42 U.S.C. §1983, concerns public statements made by two off-duty police officers criticizing racial injustices involved in two colorably unconstitutional operations of the San Francisco Police Department -- a police dragnet focusing on black men, and police station beatings of Latinos.1/

On April 19, 1974, Jesse Byrd a black police officer assigned to the Traffic Bureau of the San Francisco Police Department (C.R. 2) gathered with community leaders, while off-duty and out of uniform and read a prepared statement to the public and the press, expressing an opinion of Officers for Justice, a police officers' association primarily composed of minority

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1/ The lawsuit named as defendants Donald M. Scott, the chief of police, Washington Garner, Robert Buckley, and Marvin Cardoza, police commissioners, and two police officers with administrative responsibility in the investigation of police disciplinary matters, Hugh C. Elbert and Edward Liggins. All were sued individually and in their official capacities. (C.R. 3.) On July 15, 1977, Charles R. Gain was substituted as the successor chief of police, and Richard Siggins, Jane Murphy, Judith Ciani, Herman Gallegos, and James A. Hall were substituted as successor commissioners pursuant to Fed. R. App. Pro. 43(c)(1). Respondents Elbert and Liggins were not substituted.

References to the Clerk's Record filed in the Court of Appeals are cited as "C.R.__."

officers. (C.R. 4.) The statement criticized the tactics used against black males by the Police Department during Operation Zebra, a police stop-and-frisk operation meant to apprehend a suspected murderer, a program which the Court of Appeals found in a separate case to have "raised serious constitutional questions justifying an action for declaratory and injunctive relief." Williams v. Alioto, 549 F.2d 136, 143 (9th Cir. 1977).

Byrd's statement likened the procedures to Gestapo-type tactics, and claimed harassment of the black community. (C.R. 4, 15.) (The full text of Byrd's statement is found in Appendix C, p. 26a attached hereto.) Almost six months later Byrd was penalized by the Chief of Police and Police Commission: "For violation of Rule 2.13... when you accused the Department and many of its members of using gestapo-like tactics during the Zebra manhunt. Such vicious remarks against the Department or any member of this Department without proof is not conducive to a harmonious and efficient force." (C.R. 5, 17.) A permanent written reprimand was placed in Byrd's personnel file, which substantially affects his future in law enforcement. (C.R. 5.)

On March 6, 1974, Travis A. Tapia, a Mexican-American police officer assigned to the Community Relations Bureau of the San Francisco Police Department (C.R. 6.) gathered with community leaders, while off-duty and out of uniform and read a prepared statement to the public and the press, expressing an opinion of Officers for Justice. (C.R. 6.) Tapia also read the statement

before the San Francisco Police Commission in public session on the same day. (C.R. 6.)

Tapia's statement criticized the beatings of Latino suspects by police officers at a district police station, allegations which were subsequently investigated by the Police Department itself and the United States Department of Justice. (C.R. 7.) Tapia labelled the police actions as "police crimes" and official terrorism" stating that the incident increased community hatred of police officers. (C.R. 6, 19-20.) (The full text of Tapia's statement is found in Appendix D, pp. 27a-28a attached hereto.) Seven months later Tapia was penalized by the Chief of Police and the Police Commission: "For violation of Rule 2.13 of the Rules and Procedures in that you did not witness any acts of assaults by any officers in Mission Police Station, but you accused the Department and the members of Mission Station of committing crimes against the public. Such accusations reflect discredit upon officers of Mission Station." (C.R. 8, 27.) A permanent written reprimand was placed in Tapia's personnel file, which substantially affects his future in law enforcement. (C. R. 8.)

Petitioners Byrd, Tapia, and Officers for Justice brought suit in the United States District Court for the Northern District of California, alleging that Respondents, the chief of police and police commissioners,(C.R. 3.), had violated their rights of freedom of expression. The lawsuit sought to redress the violations primarily by seeking injunctive and declaratory relief against maintenance of the reprimands in the personnel files, and

against future enforcement of Rule 2.13. No claim for money damages has been made. Jurisdiction was conferred pursuant to 28 U.S.C. §1343(3)(4).

Petitioners raised three sets of claims in the complaint: (1) The disciplinary sanctions violate the First Amendment made applicable by the Fourteenth Amendment; (2) Rule 2.13 is unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments; and (3) The disciplinary sanctions were invidiously discriminatory because the respondents tolerate much critical speech by police officers, but pick and choose statements for discipline solely on the basis of the ideas presented, the content of speech, or the identity of the speaker, in violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment. (C.R. 9-10.)

Respondents filed a motion to dismiss and in the alternative for summary judgment, attaching five affidavits in support of the latter motion. (C.R. 55-73.) Petitioners timely objected to the sufficiency of the affidavits but did not file counter affidavits. (C.R. 110-113.) No evidentiary hearing was held. The sensitivity of petitioners' job positions, the racial injustices criticized, the actual effect of the statements on the police department, the effect of simultaneous statements made by others, and the lack of disciplinary sanctions against other officers who have made critical statements in other contexts, remained unexplored. The District Court granted summary judgment, although it did not expressly rely upon the affidavits

in any way. See Fed. R. Civ. Pro. 13(b)(6). 2/

The Court of Appeals affirmed, rejecting "the line of cases which guarantee school teachers a First Amendment right to criticize in public their school and their superiors in the school system. See, e.g. Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d. 881 (1968); Bernasconi v. Tempe Elementary School District, No. 3. 548 F.2d 857 (9th Cir. 1977)." 558 F.2d at 554; App 3a . The court found that rule 2.13 is not "facially unconstitutional" nor"episodically unconstitutional as applied in this case." Id at 554; App 2a . Without an evidentiary basis the court relied upon the palpably unsupported ground that they were "hector[ing] their department and its superiors by language calculated to inflame the public or part of it

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2/ Petitioners admitted in the complaint that other police officers had filed administrative complaints with the police department against the statements here in issue. (C.R. 5, 7, 16, 21.) But the filing of those complaints in itself is insufficient to curtail petitioners' First Amendment rights. "[T]his authority would effectively employ a majority to silence dissidents simply as a matter of personal predilictions." Cohen v. California, 403 U.S. 15, 21 (1971). Cf. Madison Joint School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976).

against the police and to affect adversely the morale and discipline of the department" and "attempt[ing] destruction" of the San Francisco Police Department. Id. at 554; App. 2a-3a.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

This case squarely presents a compelling opportunity to settle whether the First Amendment analysis developed in Pickering v. Board of Education, 391 U.S. 563 (1968), applies to the public statements of police officers in lower-echelon, non-policymaking positions of responsibility. Until the Court of Appeals rendered its decision, the answer appeared evident. 3/

3/ Numerous lower courts have applied Pickering to public statements of non-teacher government employees which were critical of superiors. Cases upholding the rights of police officers to speak out about matters of public concern in a variety of contexts include Tygrett v. Washington, 543 F.2d 840 (D.C. Cir. 1976); Hanneman v. Breier, 528 F.2d 750 (7th Cir. 1976); Haurilak v. Kelley, 425 F.Supp. 626 (D. Conn. 1977); Brukiewa v. Police Commissioner, 263 A.2d 210 (Md. 1970); In re Gioglio, 248 A.2d. 570 (N.J. Super.
(Continued on following page.)

Pickering holds that teachers may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest," 392 U.S. at 568. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees." Ibid. Pickering set out the analysis of controlling interests applicable to "highly critical" statements, Perry v. Sinderman, 408 U.S. 593, 595 (1972), "by teachers

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Footnote 3 continued.

1970). See also Battle v. Mulholland, 439 F.2d 321 (5th Cir. 1971). Other decisions have found the statements to be unprotected under the circumstances involved. E.g. Kannisto v. City and County of San Francisco, 541 F.2d 841 (9th Cir. 1976), cert. denied, 45 L.W. 3634 (U.S., March 21, 1977); Magri v. Giarruso, 379 F.Supp. 353 (E.D. La. 1974). See also Meehan v. Macy, 392 F.2d 822 (D. C. Cir. 1968), modified, 425 F.2d 472, aff'd en banc, 525 F.2d 472 (1969) (remanding in light of Pickering). Additional opinions have carefully scrutinized police personnel regulations for First Amendment overbreadth, applying the contours expressed in Pickering. E.g., Gasparinetti v. Kerr, Nos. 76-1605/6 (3d Cir., Nov. 3, 1977); Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970); Flynn v. Giarruso, 321 F.Supp. 1295 (E.D. La. 1971).

and other public employees", 391 U.S. at 569, against their superiors. The court below, however, rejected "the line of cases which guarantee school teachers a First Amendment right to criticize in public their school and their superiors in the school system." 558 F.2d at 554; App. 3a.

In rejecting the principle that pure speech made outside the tight-knit confines of the workplace implicates significant First Amendment considerations applicable to a "government employee. . .'as a citizen'", Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 284 (1977) 4/ the court also rejected the decisions of other courts of appeals dealing with police officers' rights to freedom of expression. It did so on summary judgment, without an evidentiary basis upon which to fully scrutinize the critical circumstances involved. See Perry v. Sinderman, 408 U.S. 593, 598 (1972); Askew v. Hargrave, 401 U.S. 476, 479 (1971); Adickes v. S. H. Kress Co., 398 U.S. 144, 158 (1970) 5/

4/ The only considerations deemed relevant by the court below were "unreasonable and abritrary restriction in the name of institutional policy," 558 F.2 at 554; App. 3a.

5/ Apparently, the Court of Appeals found that the words used by petitioners constituted an "abuse" of the Police Department, and were therefore unprotected by the First

(Continued on following page.)

Tygrett v. Washington, 543 F.2d 840 (D.C. Cir. 1976), involved a probationary police employee who publicly advocated that police officers hold a "sick-out" or "blue flu", that is, go out on strike. The police department dismissed him from employment on the ground that he was unfit to be a policeman. The Court of Appeals reversed the District Court's summary judgment upholding the dismissal. The Court of Appeals held that "the crucial question for decision was whether appellant's remarks, in the particular circumstances surrounding them, actually impinged upon qualities making for an effective police force in such manner as to imperil its efficiency." 543 F.2d at 848. The burden of factual demonstration rested on the police department. Id. at 849.

Hanneman v. Breier, 528 F.2d 750 (7th Cir. 1976) involved police officers who publicly criticized police operations in

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Footnote 5 continued.

Amendment. It is useful to recall that the words used by the school teacher in Pickering included the statement that the school board has a "stop at nothing' attitude", 391 U.S. at 576, and referred to "the kind of totalitarianism teachers live in at the high school, and your children go to school in." Id. at 576-77. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department v. Mosley, 408 U.S. 92, 95 (1972).

connection with an internal investigation, claiming that the police chief was acting out of improper motives, that is, harassment. 528 F.2d at 754. The Court of Appeals correctly noted that "Any unique aspect of police department employment is to be considered as but one element in the balancing of interests in an individual case." Ibid. Finding that "[t]here was no evidence that the statements were knowingly false or recklessly false," id. at 755, and considering the circumstances in which they were made, the court held that the "chief of police has not demonstrated a need to enforce the confidentiality rule against the statements here in issue," id. at 755, and reversed the judgment dismissing the lawsuit.

In both Tygrett and Hanneman the courts put particular emphasis on the circumstances surrounding the critical statements made by police officers. The decisions cannot be reconciled with the decision below because there has been no examination of the circumstances of petitioners' statements by the court below. The court saw no need to give petitioners' statements and the circumstances exacting judicial scrutiny.6/

6/ Even courts which have held that statements made by public employees in particular settings were unprotected have recognized that "findings of fact ... are all important in the resolution of the First Amendment question here involved." (Continued on following page.)

The court's characterization of the statements in this case as an "abuse" ignores "the ancient wisdom that calling a thing by a name does not make it so." Madison School District v. Wisconsin Employment Relations Commission, 429 U.S. 167, 174 (1976).

The conclusion of the court below also significantly ignores the public interest in hearing about alleged racial injustices and colorable unconstitutional police practices. As the Court of Appeals for the Third Circuit recently observed in applying Pickering to reverse, on overbreadth grounds, a district court judgment upholding a police rule against "unfavorable comment" by police officers:

> The public interest in free and open debate about its police department is vital. It is important that the public have access to the thoughts and expressions of

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Footnote 6 continued.

Fisher v. Walker, 464 F.2d 1147, 1151 (10th Cir. 1972). "[T]he court is always required to look at the place, time, and circumstances involved in striking the necessary balance between the interests of the government and the constitutional rights of the individual." Abbott v. Thetford, 529 F.2d 695, 706 (5th Cir.) (dissenting opinion), adopted as majority opinion en banc, 534 F.2d 1103 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977).

> the rank and file police officer, whose views as to the effectiveness of police policy may be quite valuable to the community. Moreover, there is an especially strong public interest in having a police union leadership who will speak openly and candidly about their members' grievances and demands.

(Gasparinetti v. Kerr, Nos. 76-1605/6, 12, n. 18 (3d Cir., November 3, 1977)).7/

The conflict between the circuits in the application of Pickering, and the need to consider the circumstances of statements by police officers, justifies the grant of certiorari to review the judgment below.

7/ Gasparinetti concerned public statements by the president of the Newark, New Jersey, Policemen's Benevolent Association. Gasparinetti "criticized [superior officers] ... for succumbing to political pressure and threats [by a black activist], and for operating outside the Department rules and regulations. He stated that [the superiors] ... were out to 'break the morale and spirit of the men,' and had practiced 'deceit and lies' in order to circumvent the collective bargaining agreement. He further asserted that there were 'cowards in the superior ranks,' and that the men hesitated to face criminals when led by leaders like [one of the superior officers]." Gasparinetti v. Kerr, supra, at 4.

II. THE DECISION BELOW RAISES SIGNIFICANT AND SERIOUS PROBLEMS IN CONNECTION WITH THE RIGHT OF POLICE OFFICERS TO SPEAK OUT ABOUT POLICE ILLEGALITY

The "powerful medicine" of the First Amendment, Cohen v. California, 403 U.S. 15, 24 (1971), cannot be limited "to things that do not matter much. That would be a mere shadow of freedom." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-42 (1943). Our society flourishes upon the recognition that "informed public opinion is the most potent of all restraints against misgovernment." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). Police officers, "are, as a class, the members of a community most likely to have informed and definite opinions" about the operations of the police. Pickering v. Board of Education, 391 U.S. 563, 572 (1968). The decision of the court below allows few possibilities that the public will learn about police wrongdoing from police officers or associations of police officers,8/ because the speaker risks disciplinary sanction by his employer after he speaks out. The result "[i]n practical operation, ... must necessarily produce a result which the State could

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8/ "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." NAACP v. Alabama, 357 U.S. 449, 460 (1958).

not command directly." Speiser v. Randall, 357 U.S. 513, 526 (1958).

Petitioners are subject to a police rule prohibiting in part any conduct which "reflects discredit upon the department or any member thereof ...." Rule 2.13. As this case illustrates, the rule applies to pure speech made off-duty and out of uniform. On its face the rule prohibits entirely correct public statements which reflect discredit, regardless whether "the position between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism ... would seriously undermine the effectiveness of the working relationship between them," Pickering v. Board of Education, supra, 391 U.S. at 570, n. 3. Compare, Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), cert. denied, 431 U.S. 937 (1977). Moreover, the rule prohibits critical communications to other governmental bodies if the communications reflect discredit on the department or any member. Surely it is possible to reflect discredit on the police department in numerous ways; operations of the police are often, and should remain, the subject of "uninhibited, robust, and wide open" debate, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Any citizen may make a public statement reflecting discredit on the police department, see, e.g., Lewis v. City of New Orleans, 415 U.S. 130 (1974); Hess v. Indiana, 414 U.S. 105 (1973); Norwell v. City of Cincinnati, 414 U.S. 14 (1973), yet police officers may not. Such a rule, which has not been limited by any authoritative construction to exclude protected speech, compare Arnett v. Kennedy, 416 U.S. 134, 162 (1974), is

substantially overbroad, Broadrick v. Oklahoma, 413 U.S. 601 (1973); Gasparinetti v. Kerr, Nos. 1605/6 (3d Cir., November 3, 1977); Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970), and impermissibly vague, Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974), cert. denied, 419 U.S. 1121 (1975).

Police rules such as the one involved here are capable of invidious enforcement solely on the basis of content of free expression or the political strength of the speaker. See Police Department v. Mosley, 408 U.S. 92, 95 (1972); Grayned v. City of Rockford, 408 U.S. 104 (1972); Niemotko v. Maryland, 340 U.S. 268 (1951). In fact, petitioners raised the issue of discriminatory enforcement as a separate claim for relief, but it was not considered by the District Court and ignored by the court below. Clearly, the complaint made out a claim for relief on equal protection grounds since its allegations must be accepted as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. 41 (1957).

First Amendment rights need "breathing space to survive," NAACP v. Button, 371 U.S. 415, 433 (1963). The extent of "breathing space" available to police officers, as citizens, to comment on matters of grave public concern, presents a significant matter demanding review by the Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

December 16, 1977 Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 75-2731

JESSE BYRD, TRAVIS A. TAPIA, AND OFFICERS FOR JUSTICE, A NON-PROFIT ASSOCIATION,
Appellants,

v.

CHARLES R. GAIN, Chief of Police, RICHARD SIGGINS, JANE MURPHY, JUDITH CIANI, HERMAN GALLEGOS, and JAMES A. HALL, Police Commissioners, [filed as DONALD M. SCOTT, etc., et al.],
Appellees.

[Filed Aug. 2, 1977]

Appeal from the United States District Court for the Northern District of California

Before: CHAMBERS and GOODWIN, Circuit Judges, and KELLEHER,* District Judge.

GOODWIN, Circuit Judge:

Two police officers appeal the summary judgment which ended their action under 42 U.S.C. §1983 against the chief of police and others. They had sued to compel the department to expunge from their personnel files written reprimands

*The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

which had been issued following complaints by other police officers. The complaints criticized a press release and public statements made by the plaintiffs in the course of a public controversy that had developed over the department's employment of stop-and-frisk tactics which had a special impact upon black males within the city of San Francisco.[1]

The district court granted the defendant's motion for summary judgment, upon the theory that the First Amendment does not guarantee the plaintiffs an unqualified platform from which publicly to hector their department and its superior officers by language calculated to inflame the public or part of it against the police and to affect adversely the morale and discipline of the department.

In granting summary judgment, the court necessarily held that San Francisco Police Department Rule 2.13 under which the reprimands were issued was not facially unconstitutional, and that it was not episodically unconstitutional as applied in this case.

We resolved the issue of facial unconstitutionality against the plaintiffs after the district court had ruled in this case. S.F.P.D. Rule 2.13 is not unconstitutional on its face for overbreadth. Kannisto v. City and County of San Francisco, 541 F.2d 841 (9th Cir. 1976), cert. denied, 45 U.S.L.W. 3634 (U.S., Mar. 21, 1977).

[1] See Williams v. Alioto, 549 F.2d 136 (9th Cir. 1977).

The officers seek to distinguish Kannisto on its facts and have us hold the regulation unconstitutional as applied in this case. They also seek to bring themselves within the line of cases which guarantee schoolteachers a First Amendment right to criticize in public their school and their superiors in the school system. See, e.g., Pickering v. Board of Education, 391 U.S. 563 (1968); Bernasconi v. Tempe Elementary School District No. 3, 548 F.2d 857 (9th Cir. 1977).

Substantial differences between the public interest in education and the public interest in safety and order justify a difference in the standards by which the respective institutions may protect themselves from attempted destruction by their employees.

The reasoning developed in Kannisto v. City and County of San Francisco, supra, and in Phillips v. Adult Probation Department, 491 F.2d 951 (9th Cir. 1974), establishes in this circuit the proposition that, while First Amendment rights of employees are deserving of protection against unreasonable and arbitrary restriction in the name of institutional policy, the employee does not have an unqualified right to abuse his employer in public while remaining on the payroll. Rule 2.13 is not unconstitutional as applied in this case.

Affirmed.

APPENDIX B

In the United States District Court
For the Northern District of California

No. C-74-2358-SW

Jesse Byrd, Travis A. Tapia, and
Officers for Justice, a non-profit
Association;
Plaintiffs,

vs.

Donald M. Scott, etc., et al.,
Defendants.

[Filed Jul. 11, 1975]

JUDGMENT IN FAVOR OF DEFENDANTS

In accordance with this Court's Memorandum and Order entered on July 1, 1975,

It Is Hereby Ordered, Adjudged and Decreed that judgment in the above-entitled matter be entered in favor of defendants.

Dated: July 11, 1975.

/s/ Spencer Williams
United States District
Judge

In the United States District Court
For the Northern District of California

No. C-74-2358-SW

Jesse Byrd, Travis A. Tapia, and
Officers for Justice, a non-profit
Association;
Plaintiffs,

vs.

Donald M. Scott, etc., et al.,
Defendants.

[Filed Jul. 1, 1975]

MEMORANDUM AND ORDER

This cause is before the Court on defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted, or, in the alternative, for summary judgment.

Plaintiffs Jesse Byrd and Travis A. Tapia are patrolmen employed by the San Francisco Police Department (SFPD), Tapia being assigned to the department's Community Relations Bureau and Byrd being assigned to the department's Traffic Bureau. These plaintiffs are also members of the Officers for Justice, an organization named as a co-plaintiff in this suit which represents some of the uniformed members of the SFPD in certain aspects of employee relations.

On March 6, 1974 plaintiff Tapia, while off-duty and without uniform, held a press conference and read a prepared statement which stated in part:

> Once again citizens of San Francisco's Latino community have been victimized by police crimes and official terrorism. The acts of assault upon persons under color of authority and willful inhumanity towards prisoners by some members of this department have increased the unnecessary hatred in the community against all officers. The time has come for all of us, police and community, to join to see that justice is done, that those officers responsible for these crimes against all of San Francisco be prosecuted before a court of law.

Apparently, Tapia's comments were made in response to an incident which took place on February 24, 1974, at Mission Dolores Park in San Francisco. On that day members of the SFPD were called in to quell a disturbance which had been provoked by causes not relevant here.

On April 16, 1974 sixty-six uniformed members of the SFPD lodged a complaint with the Internal Affairs Bureau of the SFPD alleging that Tapia's statements to the press constituted a violation of Department Rule 2.13 in that it brought discredit upon the department and therefore constituted conduct unbecoming an officer. The Chief of Police caused the complaint to be investigated, and on October 17, 1974 the Chief of Police acting with approval of the Police Commission reprimanded Tapia for violation of Department Rule 2.13 because his March 6, 1974 conduct "reflect [ed] discredit upon the department and [was] prejudicial to the officers of Mission Station."

Said reprimand was made a permanent part of Tapia's personnel file.

On April 19, 1974 plaintiff Byrd appeared, while off-duty and without uniform, at a press conference in order to make public comments about certain procedures employed by the SFPD in attempting to apprehend the persons suspected of committing the so-called "Zebra" murders in San Francisco. At that press conference Byrd distributed and read from a press release which stated:

> Ladies and gentlemen of the press, we the members of Officers for Justice, would like to make one point implicitly clear. We are just as much concerned about the apprehension of this individual or individuals as anyone else. But we do not approve of the gestapo-type tactics that are being used. We do not approve of people being stopped and frisked at random. We can only view this as another type of harrassemant [sic]. This type of killing requires the necessity of allerting the communities to become more attentive to any unusual sounds etc.
>
> Moreover, we feel that the S.F.P.D. should have relied upon the director of community relations and the officers in the unit for some type of advice or input. But instead they were intentionally ignored which leads us to conclude that the department still think [sic] that they [sic] know most effectively how to deal with the Black community.

> We do not see how the department can anticipate apprehending the suspects with this type of gestapo-type tactics.

Thereafter Officer Robert Pucetti lodged a complaint against Byrd which was investigated. On October 10, 1974 the Chief of Police acting with the concurrence of the Police Commission reprimanded Byrd.

> [f]or violation of Rule 2.13 of the Rules and Procedures when [he] accused the Department and many of its members of using gestapo-type tactics during the Zebra manhunt. Such vicious remarks against the Department or any member of this Department without proof is not conducive to a harmonious and efficient force.

Rule 2.13, the provision under which both plaintiffs were reprimanded, provides:

> Any breach of the peace, englect of duty, misconduct or any conduct on the part of any member either within or without the state which tends to subvert the good order, efficiency or discipline of the department or which reflects discredit upon the department or any member thereof or that is prejudicial to the efficiency and discipline of the department, though such offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficerlike conduct triable and punishable by the Board.

Plaintiffs seek to expunge the reprimands which have been placed in their personnel files and to enjoin the enforcement of Rule 2.13 as vague and overborad and therefore violative of their First Amendment rights.

Defendants urge this Court to dismiss the action for the following reasons: (1) the Court should abstain from ruling on the constitutionality of Rule 2.13 until the California State courts have had an opportunity to construe said rule; (2) plaintiffs have failed to exhaust state remedies and their legal relief is adequate; (3) plaintiff, Officers for Justice, does not have standing to sue in the instant action; (4) defendants Elbert and Liggins have not been properly served with process;1/ (5) plaintiffs have not been denied equal protection under the law by suffering the reprimands in question; and, most important (6) Rule 2.13 is not unconstitutionally vague or overbroad. These contentions will be treated in seriatim.

1. It would be inappropriate for this Court to abstain from ruling in this case.

Although it is true that Rule 2.13 has not been specifically addressed by any California State court, there is no compelling reason to subject plaintiffs to the delay inherent in staying our hand while the litigation is commenced and played out in state court.

1/ Plaintiffs' counsel has informed the Court that follow-up service as required

Only in narrowly limited "special circumstances" is this Court permitted to escape from immediately deciding issues such as those involved here. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 (1972). For example, abstention is appropriate when the challenged state regulation or statute is susceptible of a construction by the state courts that would "avoid or modify the federal constitutional question" raised. Zwickler v. Koota, 389 U.S. 241, 251 (1967). However, with respect to the case at bar, the Court is not satisfied that Rule 2.13 is fairly subject to an interpretation by a state court which would so modify or avoid the First Amendment issues here presented. Indeed, defendants essentially argue that such a narrowing interpretation is wholly unnecessary in light of Arnett v. Kennedy, 416 U.S. 134 (1974), which has held language similar with that found in Rule 2.13 to be constitutional. Moreover, we are not here confronted with an issue of state law which is uncertain and therefore should be first presented to the state courts

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1/ continued

by California Code of Civil Procedure, §415.20(b) has been effected as to defendants Liggins and Elbert. Since §415.20(b) imposes no time limitation upon the effectualization of the necessary follow-up mailing of the summons and complaint, plaintiffs have complied with §415.20(b)'s provisions. Therefore, Liggins and Elbert are properly before this Court and subject to any decision rendered in this action which might affect their rights.

for resolution. See, e.g., Fort v. Civil Service Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal.Rptr. 625, 629 (1964) (governmental regulations which impinged on First Amendment rights of county employee held constitutional as long as the restrictions were not broader than required to preserve the efficiency and integrity of its public service); see also Los Angeles Teachers Union v. Los Angeles City Bd. of Ed., 71 Cal. 2d 551, 455 P.2d 827, 78 Cal.Rptr. 723 (1969). Finally, irrespective of whether or not a state court proceeding is pending (Lake Carriers Ass'n, supra, 406 U.S. at 509), abstention is inappropriate in cases such as the present one where a statute or rule is attacked on its face as abridging free expression. Zwickler, supra, 389 U.S. at 254. Plaintiffs have chosen the forum in which they believe their rights will be properly vindicated, and absent compelling reasons to the contrary, this Court should defer to that choice.

2. Plaintiffs' remedy at law is inadequate and exhaustion of state remedies is not a prerequisite to the maintenance of this suit.

Plaintiffs are not required to exhaust either their state judicial or administrative remedies before seeking relief in this Court. The teachings of Monroe v. Pape, 365 U.S. 167 (1961) and McNeese v. Board of Education, 373 U.S. 668 (1963), are persuasive authority for the proposition that exhaustion in the instant case is unnecessary. In both those cases it was determined that the purposes of 42 U.S.C. §1983 (the statute under which plaintiffs here bring their cause of action)

would be defeated if"assertion of a federal claim in a federal court had to await an attempt to vindicate the same claim in a state court." McNeese, 373 U.S. at 672. Moreover, there is here no underlying issue of state law which controls the litigation. The right sought to be vindicated is purely federal in origin and nature. "Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed." Id. at 674.

Although a few Courts of Appeals have attempted to make inroads into the broad holdings of Monroe and McNeese,2/ in cases since Monroe the Supreme Court has steadfastly reiterated that §1983 actions "may not be defeated" because state-law remedies were not first exhausted. Allee v. Mendrano, 416 U.S. 802 (1974); Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); Damico v. California, 389 U.S. 416 (1967).

3. Plaintiff Officers for Justice has standing to sue in this action.

Plaintiff Officers for Justice alleges that it is a non-profit association comprised of minority personnel of the SFPD. Plaintiffs Byrd and Tapia allege that the statements which are the subjects of this action were read to the public and the press on behalf of the Officers for Justice. Defendants contend that Officers of Justice has not been damaged or deprived of any

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2/ Defendants cite a leading case, Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967), as illustrative of the narrowing gloss which

civil rights by the disciplinary action taken against Tapia and Byrd. Moreover, it is argued that Officers for Justice is, at most, merely "interested" in the issues here raised, and that such a de minimis stake in the outcome of this case is insufficient to confer standing on the organization.

2/ continued

has been applied to Monroe and McNeese in cases where, as here, only injunctive relief was sought. However, even in Potwora the court thought that to require the plaintiff to bring a state action under a state statute would deny him sufficiently prompt relief. Unable to find a practically available state remedy for the federal plaintiff to pursue by way of the state courts, the Potwora court enjoined the enforcement of the state statute there challenged, despite the fact that the plaintiff had not exhausted his state remedies. In short, the court in Potwora cannot be said to have seriously undermined the basic principles espoused in Monroe. On the contrary, the Potwora decision can only be viewed as a reaffirmation of the Monroe Court's explicit refusal to thwart, through application of the exhaustion doctrine, one of §1983's most salutary purposes, namely, "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." Monroe, supra, 365 U.S. at 174.

Generally, an organization must show an injury to itself distinct from that of its membership to support standing. Organized Migrants in Com. Act. Inc. v. James Archer Smith Hosp., 325 F.Supp. 268, 270 (S.D. Fla. 1971). An exception to this rule has evolved out of a series of cases involving efforts by several states to curtail the activities of the NAACP. The NAACP was permitted to represent the rights of its members in each of these cases, all of which involved the freedom of association (as is the case here), because "[i]n each . . . the organization itself was aggrieved by the violation of its members' rights and therefore plainly had the real adversary interest which is basic to the idea of standing." In NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), the organization had standing because of the reasonable likelihood that the association itself through diminished financial support and decreased membership might be adversely affected. Similarly, because plaintiffs Tapia and Byrd read the statements at issue here on behalf of the Officers for Justice, their reprimands may inhibit others from joining that organization. Moreover, "an organization whose members are injured may represent those members in a proceeding for judicial review." Sierra Club v. Morton, 405 U.S. 727, 739 (1972). This is especially true when representation of the interests involved is one of the primary reasons for the organization's existence. Here, Officers for Justice exists to protect and to represent the interests of minority as well as women police officers. Under Sierra Club the fact that the complaint contains allegations attesting to the injury sustained by two of its members gives the Officers for Justice standing in this suit.

See also Allee v. Medrano, 416 U.S. 802, 819 n.13.

4. Rule 2.13 is not facially vague or overbroad, nor, as applied, has it swept within its proscriptions speech which is constitutionally protected.

Plaintiffs claims that Rule 2.13 is unconstitutionally vague and overbroad on its face and as applied, and therefore void and a nullity. Defendants naturally disagree. In support of their vagueness and overbreadth arguments plaintiffs rely principally on Pickering v. Board of Education, 391 U.S. 563 (1968). Conversely, defendants bottom their contentions almost exclusively on Arnett v. Kennedy, 416 U.S. 134 (1974).

Unfortunately for plaintiffs, Pickering does not provide the support they envision for their position. Initially, the Pickering Court specifically excluded from its considerations the type of factual situation we have here. Secondly, Arnett v. Kennedy would seem to restrict the grand sweep many had previously attributed to it.

Pickering, a teacher, wrote a letter to the editor criticising his Board of Education in its prior handling of tax increase elections and its allocation of funds between athletic and educational programs. He was dismissed under authority of a state statute upon a finding that the letter was detrimental to the efficient operation and administration of the schools of the District.

The Supreme Court, Justice Marshall speaking for the majority, reversed, saying generally that a public employee need not completely relinquish First Amendment rights as a condition to employment; that there may be times when the state would have a greater interest in regulating the speech of employees than of its general citizens; but that the validity of such employee regulations had to be determined by balancing the interest ofthe employee in the exercise of his First Amendment rights against the interest of the state, in promoting through such regulation the efficiency of the public service.

Then the court went on to narrow the effect of its opinion to factually similar cases, saying:

> The Statements [of Pickering] are in no way directed towards any person with whom [he] would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among co-workers is presented here. [Pickering's] employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." 391 U.S. at 569-70.3/

3/ See following page.

It is beyond contention that the statements of plaintiffs herein were directly critical of co-workers and immediate superiors, and it is generally accepted, that personal loyalty and confidence among co-workers and immediate superiors is a basic ingredient for an effective law enforcement operation.4/

3/ The court was even more specific in its footnote when it said:

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great <u>that even completely correct public statements might furnish a permissible ground for dismissal</u>. Likewise, positions in public employment in which the relationship between superior and subordiante is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases. (Emphasis added). 391 U.S. at 570 n.3.

4/ See <u>Meehan v. Macy</u>, 392 F.2d 822, 833 (D.C. Cir. 1968), <u>modified</u>,

In Arnett v. Kennedy, Kennedy, a non-probationary Federal Employee (OEO) in civil service publicly accused his boss of attempting to bribe a representative of a community action organization to sign a statement against him. He was dismissed per civil service procedure. 5 U.S.C. §7501(a).

Justice Rehnquist (Burger and Stewart concurring) rejected appellee's contention that the Act and implementing regulations were unconstitutionally vague due to their failure to furnish sufficiently precise guidelines as to what kind of speech might serve as the basis for a removal action. Justices Powell, Blackmun and White concurred in this portion of the opinion.

The statutory language in question provided that "[a]n individual in the

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4/ continued

425 F.2d 469, aff'd en banc, 425 F.2d 472 (1969):

> This invective by a policeman, charged under the circumstances with a special responsibility and requirements of discipline, against the official ranking as chief of the force, is such a flouting of elemental loyalty to his employer and their common enterprise as to provide cause for discharge, except as the employee's acts may be necessary to preserve his own protected rights."

competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service." 5 U.S.C. §7501(a). Both the Civil Service Commission and OEO adopted almost identical implementing regulations which provide, in essence, that employees shall avoid any action which might result in or create the appearance of "affecting adversely the confidence of the public in the integrity of the Government." 5 C.F.R. §735.201a; 45 C.F.R. §1015.735-1.

Quoting from CSC v. Letter Carriers, 413 U.S. 548, 578, 579 (1973) to the effect that prohibitions are sufficient if ordinary persons exercising ordinary common sense can understand and comply with them without sacrificing a more compelling public interest, Justice Rehnquist said:

> We do not believe that Congress was confined to a choice of enacting a detailed code of employee conduct, or else granting no job protection at all . . . . Because of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required, the employee conduct which is ground for removal. 416 U.S. at 159, 161.

Justice Rehnquist also quoted pertinent and compelling language from Meehan v. Macy, supra, at 835:

> [I]t is not feasible or necessary for the Government to spell out in

detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include 'catchall' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.' We think it is inherent in the employment relationship as a matter of common sense if not [of] common law that [a Government] employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [cartoons] . . . . [Dismissal in such circumstances neither] comes as an unfair surprise [nor] is so unexpected as to chill . . . freedom to engage in appropriate speech. 416 U.S. at 161-62.

In view of the foregoing, it cannot be said that the language at issue here fails to pass constitutional muster.5/

It is also argued that even if the regulation is not unconstitutionally overbroad the court is without sufficient evidence at this juncture to adequately consider a

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5/ The fact this case involves a reprimand rather than a suspension or dismissal further buttresses this conclusion:

> . . . where an agency proceeds by way of reprimand it substantially defangs the bite of a claim of unfaireness due to vagueness. Waters v. Peterson, 495 F.2d 91, 101 (D.C. Cir. 1973).

Pickering type balancing of plaintiffs' interest to comment against the defendants' interest to promote the efficiency and discipline of the San Francisco Police Department and that therefore a full evidentiary hearing is required.

While such a position might have merit in a different factual context, it is without merit here.

The Pickering exclusion of cases having factual settings similar to the case at hand is tantamount to an acknowledgement by the Court that statements, whether true or not, which cause friction among co-workers, or between workers and immediate supervisors, are clearly detrimental to the efficient operation and administration of a public agency. While the Supreme Court would not intimate its views as to how it would resolve any specific cases in the excluded area, this Court is here required to do so, and is of the view that it would not be unreasonable to employ a balancing technique similar to that applied in Pickering with the modification that the balance be weighted in favor of the employer's concern for efficient operation and against the employee's freedom to make public comment. The weight to be accorded the Agency's regulation would depend in turn on both the magnitude and validity of the Agency's concern and the importance and content of the employee's comment.

In the instant case, the Police Department has been and was operating against a backdrop of public unrest over racial tensions and wide-spread concern as to the Department's ability to cope with the

rising tides of crime and lawlessness. This phenomenon is not dissimilar to the concern present in most metropolitan areas of the nation, although heightened here by the well publicized unsolved murders of several police officers and the operations of the so-called Zebra Gang. At the time the specific incidents provoking the reprimands here challenged took place, the Zebra Gang was reported to be a group of blacks bent on wantonly murdering as many whites as possible, and even though as of April 19th over a dozen such murders had taken place 6/ the police could report no tangible clues and had no suspects in custody. This was so even though the Department had launched what was reported to be the most intensifed manhunt in the City's history, and had authorized their officers to employ stop-and-frisk procedures of questionable constitutional validity.7/ These, of course, were the

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6/ See Williams v. Alioto, Civil No. 74-866-ACW (N.D. Cal. April 25, 1974) (Findings of Fact entered by Judge Zirpoli at 2).

7/ Even at the height of the tension created by the Zebra man-hunt, black male citizens personally threatened by the SFPD's investigative techniques chose to air their grievances through appropriate judicial channels. Resort to remarks aimed at exacerbating rather than calming the situation was eschewed in favor of orderly procedures. And their efforts were not unavailaing [sic], for in their suit brought against the Police Department Judge Zirpoli

procedures characterized by Byrd as 'Gestapo-type tactics'. And given the volatile conditions prevailing when both Byrd's and Tapia's statements were made, it cannot be persuasively argued that the SFPD did not have a justifiably strong interest in curtailing, through the use of properly limited disciplinary action, further outbursts of the nature involved here. See Fisher v. Walker, 464 F.2d 1147 (10th. Cir. 1972).

So much for the magnitude and validity of the defendants' concern for conduct which would discredit the department so as to prejudice its discipline and efficiency.

A review of plaintiffs' respective statements reveals a total lack of factual substance.

Tapia, referring to a prior incident involving police efforts to quell a near riot, merely expressed his opinions, in deliberate and unmistakably inflammatory terms, that his police co-workers were engaging in criminal conduct and willful inhumanity towards prisoners. That these remarks created friction in the department is evidenced by the complaint signed by his 66 fellow officers.

7/ continued

enjoined further utilization of the stop-and frisk procedures as violative of the Fourth and Fourteenth Amendments. Williams v. Alioto, supra.

Byrd's statement, which in essence appears to be more a beef that he was not consulted before the procedures were adopted rather than a complaint as to the procedures themselves, 8/ also contains no new factual matters. They are merely a vitriolic tirade against the department.

That public employees enjoy the rights of freedom of expression protected by the First Amendment cannot be, and by this opinion is not denied. This Court recognizes and, in fact, encourages responsible public discussion and criticism, of any public agency's program with which a public employee has a legitimate complaint. But such right does not include the inflammatory, conclusionary and vicious remarks here under consideration which the Court finds treatened [sic] significant working relationships and discipline vital to the administration of the department.

8/ Where the matter commented upon is of departmental rather than of general public interest, the balance is further weighted in favor of governmental regulation of the speech involved. Fisher v. Walker, supra, 464 F.2d at 1154.

For the foregoing reasons, defendants' motion for summary judgment is hereby GRANTED. 9/

DATED: 7/1/75

/s/ Spencer Williams
UNITED STATES DISTRICT JUDGE

9/ Because plaintiffs' equal protection claim is dependent upon whether they possess a First Amendment right to speak as they did, it is obvious that by this Order such claim is rejected.

APPENDIX C

(Statement of Jesse Byrd)

Ladies and gentlemen of the press, we the members of Officers for Justice, would like to make one point implicitly clear. We are just as much concerned about the apprehension of this individual or individuals as anyone else. But we do not approve of the gestapo type tactics that are being used. We do not approve of people being stopped and frisked at random. We can only view this as another type of harrassemant [sic]. This type of killing requires the necessity of alerting the communities to become more attentive to any unsual [sic] sounds etc.

Moreover, we feel that the S.F.P.D. should have relied upon the director of Community Relations and the officers in the unit for some type of advice or input. But instead they were intentionally ignored which leads us to conclude that the department still think that they know most effectively how to deal with the black community.

We do not see how the department can anticipate apprehending the suspects with this type of gestapo type tactics.

THANK YOU.

(C.R. 15.)

APPENDIX D

(Statement of Travis A. Tapia)

Once again citizens of San Francisco's Latino community have been victimized by police crimes and official terrorism. The acts of assault upon persons under color of authority and willful inhumanity towards prisoners by some members of this department have increased the unnecessary hatred in the community against all officers. The time has come for all of us, police and community, to join to see that justice is done, that those officers responsible for these crimes against all of San Francisco be prosecuted before a court of law.

The Officers for Justice call upon the Mayor, Honorable Joseph Alioto, members of the Board of Supervisors, the Police Commission, Chief of Police Donald Scott and his administrators, the members of the Police Officers Association, and the members of the Supervisory Officers Association, if they truly be men of good will and fired by a sense of indignation over injustice, to assist a beleaguered people in our struggle for dignity and survival.

The abysmal failure of present departmental investigation of complaints and consequential discipline, this failure to mitigate and eventually iradicate [sic] this violence against our people must be rectified by swift remedial actions involving members of our community.

We in no way advocate that the constitutional guarantees and civil rights of any person, be he a peace officer or a citizen, be denied. Yet, these crimes are no different from any other in the statutes

in that the corpus delecti is to be established, complaints filed with the District Attorney, warrants of arrest be issued by the Court, and the accused be brought before a magistrate for a fair and speedy trial in accordance with the law.

Although some may think these actions drastic, our people in the minority communities of San Francisco cry out for justice in a situation which has become intolerable and presents an insidious peril for us all, police and citizens.

To our fellow officers in the San Francisco Police Department who are not of our persuasion but who truly believe that we are here to serve the people who employ us: we wish no ill towards you. At the base of human existence we are no different from you; we too are fathers, sons, and brothers, and bear the same love and pride for our families and our people as you do. If you can examine your conscience with honesty and imagine a similar attack on the sensibilities and person of one you love, then you will understand our rage. If not, then we continue a course towards confrontation from which we, the Officers for Justice, cannot deviate. Our cause is just and we cannot abandon our people. (C.R. 19-20.)

Supreme Court, U. S.
FILED
JAN 23 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-909

JESSE BYRD, TRAVIS A. TAPIA
AND OFFICERS FOR JUSTICE,
Petitioners,

vs.

CHARLES R. GAIN, *et al.*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The United States Court of Appeals
For the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals For The Ninth Circuit

Respondents Charles R. Gain, Richard Siggins, Judith Ciani, Herman Gallegos, Jane Murphy, James A. Hall, Hugh C. Elbert and Edward Liggins file this Brief in opposition to the Petition for a Writ of Certiorari and pray that the Writ be denied.

QUESTIONS PRESENTED

1. Whether the decision below of the Court of Appeals for the Ninth Circuit conflicts with a decision of another Court of Appeals on the same matter.

2. Whether certiorari is appropriate in this case to review specific facts and evidence which formed the basic for a decision adverse to Petitioners.

STATEMENT OF THE CASE

On April 19, 1974, petitioner Jesse Byrd called and conducted a press conference at which print, radio and television media representatives were present. On that date, Jesse Byrd was a police officer of the San Francisco Police Department. He called the press conference on behalf of an organization of which he was a member, the Officers for Justice, which organization represented some of the uniformed members of the police department in certain aspects of employee relations.

At the press conference Officer Byrd identified him-

self as a police officer. He made a statement relating to a then on-going police operation seeking to apprehend the so-called "Zebra" killer(s). See *Williams v. Alioto*, 549 F.2d 136 (9th Cir. 1977). In the statement, Officer Byrd criticized the Zebra operation in the most inflammatory terms imaginable:

> "Ladies and gentlemen of the press, we the members of Officers for Justice, would like to make one point implicitly clear. We are just as much concerned about the apprehension of this individual or individuals as anyone else. But we do not approve of the Gestapo type tactics that are being used...
>
> "We do not see how the department can anticipate apprehending the suspects with this type of Gestapo type tactic." (C.R. 4, 15.)[1]

As a consequence of the statement made by Officer Byrd, a complaint by another police officer was made to the Internal Affairs Bureau of the police department. The substance of the complaint was that Officer Byrd's remarks were detrimental to the entire department and significantly interfered with its operations. After hearings by both the Chief of Police and the Police Commission, Officer Byrd was reprimanded in writing for violation of Department Rule 2.13. (C.R. 17.)

Earlier that same year, on March 6, 1974, petitioner Travis A. Tapia called a press conference at which representatives of the various media were present. On that date, Travis Tapia was an officer of the San Fran-

1. Respondents will adopt the same reference procedure to the Clerk's Record in the Court of Appeals as used by Petitioners.

cisco Police Department. He called the press conference on behalf of the Officers for Justice, an organization of which he was a member.

At this press conference, Officer Tapia made remarks concerning incidents which had occurred some weeks before in a park in San Francisco. Though he had not been present at the park nor seen anything that happened there, Officer Tapia criticized the police conduct on that day as having been criminal:

> "[O]nce again citizens of San Francisco's Latino community have been victimized by police crimes and official terrorism. The acts of assault upon persons under color of authority and willful inhumanity towards prisoners by some members of this Department have increased the unnecessary hatred in the community against all officers. The time has come for all of us, police and community, to join to see that justice is done, that those officers responsible for these crimes against all of San Francisco be prosecuted before a court of law..."

Officer Tapia's remarks prompted sixty-six complaints by other police officers that his statement made on behalf of a police organization undermined the order, efficiency and discipline of the department as a whole. (C.R. 20.) The Police Commission ultimately reprimanded Officer Tapia in writing for violation of Department Rule 2.13.

Petitioners filed a complaint pursuant to 42 U.S.C. § 1983, alleging that Respondents had infringed on their First Amendment freedoms and denied them equal protection of the law. Thereafter, the District Court granted Respondents summary judgment, re-

solving all the claims in the complaint in their favor. (C.R. 142.) The Court of Appeals for the Ninth Circuit affirmed. 558 F.2d 553 (9th Cir. 1977). The Court of Appeals held that the remarks made by both officers were not protected speech under the First Amendment. The appellate court recognized the principle that police officers are to be viewed differently than school teachers in terms of the discipline that may be imposed for unfounded inflammatory criticism of the employer and fellow employees. The Court of Appeals also followed a previous decision of that circuit by holding that Rule 2.13 was not facially unconstitutional, nor was it deemed unconstitutionally applied in this case.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. THE DECISION BELOW DOES NOT CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

Petitioners argue on several occasions in their Petition (see, e.g., pages 11, 13) that the Court of Appeals in the decision below refused to apply the First Amendment standards evolved in such cases as *Pickering v. Board of Education*, 391 U.S. 563 (1968). Citing numerous decisions of other circuits, petitioners seek to create the impression that the appellate decision in this case is a backward step in judicial protection of freedom of speech. A close review of both the cases cited by petitioners and the decision below demonstrates the fallacy of this argument. In fact, the Court of Appeals for the Ninth Circuit has always rendered decisions in

this area of police employer-employee relations consistent with the holdings of this Court and the other circuit courts.

First of all, the decision by the Court of Appeals herein must be read together with the decision in *Kannisto v. City and County of San Francisco*, 541 F.2d 841 (9th Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 1552, 51 L.Ed.2d 775 (1977). *Kannisto* is a virtual companion case to the instant one. In *Kannisto*, a lieutenant in the San Francisco Police Department roundly criticized a superior in front of his men at roll-call. In its decision, the Court of Appeals referred to and applied the basic principles of First Amendment analysis set forth in *Pickering*. The Court of Appeals in *Kannisto* acknowledged that police officers are not " 'relegated to a watered-down version of constitutional rights.' " (Citation omitted), *Kannisto, supra*, at 843. It further observed that Kannisto had an interest in commenting on the operations of the police department, and the public had an interest or right to be informed on matters of general interest. *Id.* Nevertheless, the Court of Appeals affirmed the dismissal[2] of Kannisto's suit brought pursuant to 42 U.S.C. § 1983.

In *Kannisto*, the Court of Appeals applied several of the criteria announced in *Pickering*. It found that the police lieutenant's employment was directly and substantially involved in the subject matter of the communication. Further it observed that the involvement of a police organization compelled consideration of

2. Petitioners herein had an opportunity to avoid an adverse judgment by submitting affidavits creating issues of fact. This they declined to do. Petition, page 9.

interests in discipline, *esprit de corps* and uniformity that do not figure in the case of a school teacher. The statements by Kannisto also obviously impacted upon persons that he would be in contact with in his daily work, and it could be expected that proper performance of police duties would be impeded by his statements. Lastly, the Court of Appeals rejected the contention that Rule 2.13 was unconstitutionally overbroad on its face or as applied. *Id*, at 843-845.

The Court of Appeals in the decision below was disinclined to write a lengthy treatise on a case lacking any novel elements to distinguish it from the holding in *Kannisto*. In the instant case, the petitioners made statements the subject matter of which related directly to their police employment. They criticized police operations in which many of their fellow officers participated, prompting in Officer Tapia's case the filing of sixty-six complaints by other police officers. The employer interests of discipline, *esprit de corps* and public acceptance of the police function clearly overbalanced whatever communicative interests were contained in statements accusing the department of "Gestapo type tactics" and of condoning and promoting "police crimes and official terrorism." The Court of Appeals in both *Kannisto* and the instant case properly distinguished the application of First Amendment standards in the case of police officers in a specific factual context from those controlling in the case of a school teacher.

The decision below in no way conflicts with the decisions of other circuits *on the same matter*. This italicized phrase from Rule 19 of the Supreme Court Rules

requires consideration of the particular *facts* of other circuit decisions. It is not enough for petitioners to invoke the provisions of Rule 19(1)(b) by pointing to the fact that several circuit decisions involved communications made by police officers. A more thorough exposition of the cited cases demonstrates that they in no way conflict with the decision or decisions (if *Kannisto* is reviewed as well) below.

Thus in *Tygrett v. Washington*, 543 F.2d 840 (D.C. Cir. 1976), the matter was returned to the District Court because of its failure to address the free speech issues inherent in the facts. In the instant case, both the Court of Appeals and the District Court applied the appropriate First Amendment tests and resolved the matter against petitioners.

In *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976), certain police officers had been disciplined for release of internal police information in violation of a department confidentiality rule. The Court of Appeals reversed the dismissal of the action by the District Court, the reversal turning on the fact that the confidential materials disclosed had already been published in a newspaper and hence could no longer be properly termed "confidential."

Contrary to the claims made by petitioners, the particular circumstances of the statements at issue herein were closely examined by the District Court. See Appendix B to the Petition, pages 17a, 21a-24a. It was hardly necessary for the Court of Appeals to engage in another long exposition of the facts in order to properly conclude that petitioners were deserving of no relief.

This Petition for a Writ of Certiorari provides further support to the observations of Judge Sneed, concurring in *Kannisto, supra*, at 845:

> "A society which accepts no accommodation [of state and First Amendments interests] save that mandated by a federal court is neither strong nor happy. Moreover, such reliance on the federal courts slowly saps their strength. Inevitably they become but another suspect mediative institution indistinguishable from those they supplanted. We have not reached that point as yet. Being required to intervene in cases such as this, however, contributes little to our avoidance of this fate."

Petitioners do little to preserve the effectiveness of the federal courts by bringing actions such as the instant one and then making an unwarranted use of every procedural device thereafter to keep the controversy alive. This Court should not reward their efforts, even temporarily, by permitting additional review of a sound exercise of judicial discretion.[3]

II. THE PETITION RAISES ISSUES SOLELY RELATING TO REVIEW OF FACTS AND EVIDENCE THAT SHOULD NOT BE RESOLVED ON A WRIT OF CERTIORARI.

A review of the Petition for a Writ of Certiorari in this case discloses that a good deal of the petitioners' arguments spring from their claims that the lower courts failed to properly review the evidence and facts before them. As was made evident by the analysis

3. See also *Hosford v. State Personnel Board*, 74 Cal.App.3d 302, 306, 141 Cal.Rptr. 354, 356 (1977); *Shipp v. Davis*, 48 Ill.App.3d 463, 362 N.E.2d 822 (1977).

supra, the District Court and Court of Appeals both applied the standard appropriate to a case involving First Amendment issues. Petitioners quarrel with the decision below by highlighting the fact that petitioners held "lower-echelon, non-policymaking positions of responsibility" in the police department. Petition, pages 3 and 11. They also emphasize that petitioners were off-duty and out of uniform when they appeared at their respective press conferences. Petition, page 6. Finally, petitioners also complain of the fact that the District Court granted summary judgment without allegedly having a sufficient factual or evidentiary record before it. Petition, pages 9, 13 and 15.

These arguments all resolve down to the common denominator that petitioners disagree with the way both lower courts interpreted the facts. It is a settled principle that a writ of certiorari is not issued in order to review the evidence or second-guess the courts most familiar with the factual record. *National Labor Relations Board v. Waterman S.S. Corp.*, 309 U.S. 206, 208 (1940); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *United States v. Johnston*, 268 U.S. 220 (1925). Petitioners argue that these facts were deserving of more respect than was accorded them below. This is no reason for the granting of their petition.

As for the fact that summary judgment was rendered below, the petitioners cannot be heard to complain of that now. Federal Rules of Civil Procedure 56(e) gives the opponent of a motion for summary judgment the option to produce affidavits if necessary.

Obviously petitioners felt that no such evidentiary materials were necessary. Thus the District Court was on the face of the moving papers confronted with no material issues of fact. Summary judgment under Rule 56 "shall be entered" in such circumstances.

Moreover, if petitioners due to the posture of the case were unable to secure affidavits in opposition to the motion, opposition pursuant to Rule 56(f) could have been made. Evidently it was not. Petitioners declined to take the opportunity when they had it to bring all material facts to the attention of the District Court. It is too late to complain about the results.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

DATED: January 10, 1978.

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CERTIFICATE OF SERVICE

I, GEORGE E. KRUEGER, attorney for Respondents herein, hereby certify that, on the 20th day of January, 1978, I caused copies of this Brief in Opposition to the Petition for a Writ of Certiorari to be served on all parties required to be served by mailing three (3) copies in a duly addressed envelope to Amitai Schwartz, Northern California Police, Practices Project, 814 Mission Street, San Francisco, California 94103; Vilma S. Martinez, Morris J. Baller, Mexican American Legal Defense and Educational Fund, 28 Geary Street, San Francisco, California 94108; Sanford Jay Rosen, Rosen, Remcho, & Henderson, 155 Montgomery Street, San Francisco, California 94108; Margaret Crosby, Alan L. Schlosser, American Civil Liberties Union Foundation of No. California, Inc., 814 Mission Street, Suite 301, San Francisco, California 94103; *Attorneys for Petitioners.*

Dated:

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